CRIMINAL APPEAL (DB) No.481 OF 1988

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Against the judgment and order dated 11th of July, 1988, passed by Sri B.D. Jha, the learned Sessions Judge, Begusarai, in Sessions Case No.480 of 1986.

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1. Kokil Mahto
2. Arbind Mahto : ... ... Appellants

Versus

The State of Bihar: ... ... Respondent

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For the Appellants: Mrs. Rina Sinha, Amicus Curiae

For the S t a t e: Mr. Lala Kailash Bihari Prasad, Public Prosecutor

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P R E S E N T

THE HON'BLE MR. JUSTICE SUDHIR KUMAR KATRIAR

THE HON'BLE MR. JUSTICE SYED MD. MAHFOOZ ALAM

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S K Katriar
&
S.M.M. Alam, JJ. The two appellants challenge the judgment dated 11.7.1988, passed by the learned Sessions Judge, Begusarai, in Sessions Case No.480 of 1986 (State of Bihar Vs. Arbind Mahton & another), whereby they have been convicted under section 302 read with section 34, as well as section 201 of the IPC, and they have been sentenced to undergo imprisonment for life for the offence under section 302 read with section 34 of the IPC, and five years rigorous imprisonment under

section 201 of the IPC. Both the sentences have been directed to run concurrently.

2. Learned counsel for the appellants did not appear in spite of repeated calls. We have, therefore, appointed Mrs. Rina Sinha, Advocate, to assist us as Amicus Curiae.

3. The fardbeyan (Exhibit-2) of one Sitaram Mahto (P.W.2) was recorded with Begusarai Police Station, wherein it was alleged that his sister, Geeta Devi, was married to appellant no.2 (Arbind Mahto) about three years ago. Appellant no.2 is the son of appellant no.1. The second marriage (*तेंग्ग*) had taken place on 28.12.1982, whereafter she was continuously living in her *Sasural*. The appellants had ever since the time of marriage demanding a bicycle and a watch, but they were unable to provide the same because of their poverty. At the time of second marriage (*तेंग्ग*), Ganesh Mahto, brother of appellant no.1 had once again demanded the two items. The informant had expressed his inability to provide the same at that point of time but assured that he is making arrangement for the same. It is further stated that he had visited her *Sasural* at village Ratanpur-Bishnupur in the last week of January 1983, but appellant no.1 did not allow the informant to meet his sister and said that he

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cannot meet her sister such time till the two items were supplied.

It is further stated in the Fardbeyan that on 8.3.1983, one Kamali Devi (P.W.4), a fish-vendor of the village, had gone over to Ratanpur-Bishnupur and had met his sister. She had told Kamali Devi that the *Sasural* people were brutally harassing her, she may loose her life, and had asked her to inform the informant to provide the two articles. On hearing this from Kamali Devi, the informant made efforts to arrange the money for the same. On 16.3.1983, he had gone over to Ratanpur-Bishnupur to meet her sister but found appellant no.2 wearing *"sadi"*. On enquiry from his family members, he learnt that Geeta Devi died on 9.3.1983. The villagers had discreetly told him that his sister had been done to death by the two appellants as well as the female inmates of the house and had hurriedly drowned her in the river. On these allegations, Begusarai P.S. Case No.0083, dated 16.3.1983, under sections 302 and 201 of the IPC was registered. The formal F.I.R. was drawn on the same day and has been marked Exhibit-1.

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4. The police commenced investigation and submitted charge-sheet recommending trial of the two appellants under section 302 read with section

34 as well as section 201 of the IPC. The learned Sessions Judge framed the charges against the two appellants under the said sections.

5. The prosecution examined four witnesses in support of its case. P.W.1 is Rana Lakshmeshwar Singh. He was then posted as Jamadar in Begusarai Town Police Station on 13.3.83. He was entrusted with the investigation of Begusarai P.S. Case No.83 of 1983, on 16.3.1983. He had passed on the investigation to R.S. Mahto, Thana in-Charge on 7.9.1983. He proved the F.I.R. which has been marked Exhibit-1. He is a formal witness and not of any help in this case.

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6. P.W.2 is Sitaram Mahto (the informant), and the full brother of the deceased. Appellant no.2 (Arbind Mahto) is his own *Bahnoi*, and appellant no.1 is the father of the latter. He has deposed to the effect that the deceased Geeta Devi was his sister. Kamali Devi (P.W.4) had gone over to Ratanpur-Bishnupur to sell fish. She had met Geeta Devi as per the request of P.W.2. After she returned, she had informed him (P.W.2) that Geeta Devi told her to inform P.W.2 that he should supply a watch and a bicycle to appellant no.2. He was unable to arrange the same on account of financial constraints. He had received his sister’s message

from Kamali Devi on 8.3.1983. After arranging the money, he had gone over to his sister's *Sasural* on 16.3.1983. He found appellant no.2 wearing "*उतरी*", and, on enquiry, appellant no.2 had informed him that his sister had died on 9.3.1983. He had learnt from the villagers that she has been done to death by the two appellants along with the female inmates. He had then gone over to the police station to institute a case against the appellants. He had given his written report to the Thana in-Charge which is marked Exhibit-2. He said that he recognises appellant no.1. He had said in his cross-examination that village Ratanpur-Bishnupur is situate at a distance of *पांच कोस* (ten kilometers) from his village. He has further stated that neither he was aware of the death of his sister, nor the other family members of his house. He has also stated in his cross-examination that he had given two items of jewellery of gold and three items of jewellery of silver to his sister at the time of her marriage. He has also stated that, after he had visited the house of the appellants, appellant no.2 had merely informed him that his sister was dead. He had not informed him that she died on account of pain in the stomach. He has proved Exhibit-2.

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It appears to us that P.W.2 had heard of the atrocities for supply of two items in dowry on her sister in the *Sasural* from Kamali Devi. One thing stated in his cross-examination deserves our serious attention. He says that Ratanpur-Bishnupur, the village of the appellants, is situate at the distance of *पांच कोस* from his village. It needs careful consideration whether it is in the natural course for P.W.4, the fish-vendor and a woman, to walk over a distance of *पांच कोस* to sell 10 Kg. of fish carrying the same on her head. We shall consider it at the appropriate stage. P.W.2 has otherwise withstood the test of cross-examination, and the prosecution has not been able to elicit any contradiction.

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7. P.W.3 (Ram Dinesh Singh) is the Thana in-Charge of Begusarai Nagar Police Station, who was posted there in 1983. He has deposed to the effect that Sitaram Mahto had visited the police station on 16.3.1983, and had given a written application. The First Information Report is in the hand-writing of Suman Sharan Modi, Thana in-Charge, and has been marked Exhibit-1. He has further stated in his cross-examination that on 17.3.1983, he had inspected the place of occurrence. He had entrusted the investigation to P.N. Paul on

10.11.1983. Shobha Kant Jha had submitted the charge-sheet. He has withstood the test of cross-examination which in fact is not of much help.

8. P.W.4 is Kamali Devi, who is engaged in the trade of selling fish. She has deposed to the effect that she had gone over to village Ratanpur-Bishnupur about 4-5 years ago to sell fish. She had known Geeta Devi from before and recognised her. She was married to appellant no.2, in village Ratanpur-Bishnupur. Geeta Devi had asked her to inform her brother that he should provide a watch and a bicycle to the appellants otherwise she will be done to death by them. After returning to the village, she had informed Sitaram Mahto of the same. She has stated in her cross-examination that she had conveyed the message of Geeta Devi to Sitaram Mahto only. She has also stated that she had never canvassed with Geeta Devi prior to that. She does not remember as to the persons to whom she had sold fish at village Ratanpur-Bishnupur. She had gone over to Geeta Devi after selling the fish. She used to meet Geeta Devi in her *Naihar.* She has not heard of any conversation or talk about dowry in her *Naihar.* She has also deposed to the effect that she had gone over to Ratanapur-Bishnupur to sell fish after the death of Geeta Devi. She has denied the

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suggestion that she has ever heard the demise of Geeta Devi on account of pain in her stomach. She had heard from the people that nothing had happened to her, yet she died.

It is significant to note that the defence did not put her question whether or not it was possible for her to walk over the distance of "*पांच कोस*" to village Ratanpur-Bishnupur with the load of fish on her head to sell the same. She was aged 40 years on the date of her deposition on 3.5.1988. She was, therefore, 34 years on October 1982. In any case, women in villages are quite hardy and given to strenuous work and long walks to earn their livelihood. We, therefore, concede that it would be in the natural course for P.W.4 to travel this distance to earn her livelihood. She has otherwise withstood the test of cross-examination.

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9. The defence has examined one witness. D.W.1 is Lakshmi Narain Singh, a co-villager, a cultivator, and a local Mukhiya. He has stated in his examination-in-chief that the house of appellant no.1 is situate within his Panchayat. The daughter-in-law of appellant no.1 had died on account of pain in the stomach and in natural course. He has stated in his cross-examination that

he knows each and every female member of the house of appellant no.1. He had never seen Geeta Devi, let alone the question of talking to her. He has heard of her death and the reason of her death from the neighbours. He has also stated in his cross-examination that he had learnt that the doctor had come for her treatment. He was not aware about the treatment. He has never asked for the medical prescription, nor seen it. He had never asked appellant no.1 to inform the *Naihar* people of Geeta Devi. The birth and death registered is maintained by the Gram Sewak. He has not seen the register. Appellant no.1 is working as labourer. He has denied the suggestion that Geeta Devi died her natural death.

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It appears to us that D.W.1 is a tutored witness and has been set up to give false evidence. He has/had no personal knowledge of the illness of Geeta Devi. The same has to be read with the deposition that he learnt that doctor had visited her for treatment. If that were so, the defence ought to have produced the medical prescription and ought to have examined the doctor who had treated her. That would have gone long way in rebutting the presumption which attaches to Section 113-B of the Indian Evidence Act.

10. We have perused the materials on record and considered the submissions of learned counsel for the parties. It appears to us that Geeta Devi was married to Arbind Mahto (appellant no.2) about three years prior to her death. She was given few items of jewellery at the time of her marriage. It further appears to us that the appellants had been demanding a bicycle and a watch ever since the time of the marriage. P.W.2 has further stated in his deposition that he was informed by P.W.4 on 8.3.1983 that Geeta Devi had conveyed to her brother that the two items should be supplied to the appellants forthwith, otherwise she may loose her life. P.W.4 has also deposed to the effect that she had visited Geeta Devi on 8.3.1983, on the request of P.W.2. Geeta Devi had asked P.W.4 to convey the message to P.W.2 that the two items be supplied to the appellants quickly, otherwise she may loose her life. It further appears that P.W.2 was unable to arrange the money for the two items. It further appears from the depositions of the two witnesses that after he received the message of Geeta Devi through P.W.4, he arranged the money for the purpose and went over to village Ratanpur-Bishnupur on 16.3.1983, and found appellant no.2 wearing "*उतरी*''. It is well-known

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that "उतरी" (the scanty loincloth) is worn by persons of the Hindu community who apply fire to the funeral pyre of the dead body to perform the last rites of cremation. The *Shradh,* the period of mourning in amongst Hindus, normally covers a period of 12-14 days and during which period the person who is performing the last rites of cremation and *Shradh* wears the scanty loincloth because he is in the state of mourning. The cremation is normally done by a near relative like son, husband, etc.. For example, in the case of demise of woman, the son normally does the cremation. It appears in the present case that the couple did not sire a child and, therefore, cremation by the husband is equally well-established custom in the Hindu community. D.W.1 has stated in his deposition that appellant no.1 is a labourer. It thus appears on examination of the evidence on record, particularly P.Ws.2 and 4, that the appellants had been consistently making demands of dowry of two items, namely, a bicycle and a wrist-watch from P.W.2. It is obvious that the two families are poor people. It is common experience that the demand of dowry of these two items in that category of people in the village is a very common and usual feature. It appears to us that the

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appellants had been persisting with the demands of these two items of dowry ever since the marriage has taken place which P.W.2 was unable to provide because of his indigent circumstances. When P.W.2 received message of Geeta Devi through P.W.4, that the threat has become real, he took urgent steps to arrange money for the same which he was able to arrange within one week and go to her Sasural but found that she was already dead.

11. The defence has examined one witness. We have summarised the evidence of D.W.1 hereinabove and are of the view that his deposition does not inspire confidence. He has made an attempt to establish that Geeta Devi had died a natural death, perhaps on account of some ailment because of pain in her stomach. He has also deposed to the effect that he has learnt from the neighbours that doctor had visited her to treat her. We are of the view that he is not a dependable witness. The doctor who had treated her had not been examined, and the medical prescription is also not on record. He has not even seen the prescription. He has thus made unsubstantiated evidence in his examination-in-chief and has rendered himself untrustworthy by his own statement.

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12. The learned trial court had convicted the appellants under section 302 read with section 34 as well as section 201 of the IPC. Law is well settled by a long line of cases of high authority that, in a situation like the present one where the wife was in the custody, care and possession of the husband and the *Sasural* people, the onus shifts to them to explain the reasons for her death. They have produced only D.W.1, whose evidence has been discussed hereinabove and has been discarded for the reasons stated hereinabove. We are thus of the view that the defence has failed to discharge its onus. This, however, does not conclude matters.

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13. It appears to us that this case is really covered by section 304-B of the IPC. The same reads as follows:

> "304B. Dowry death.- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.
>
> Explanation.- For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

> (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

In view of the aforementioned discussion, we are clearly of the view that the crime is in unmistakable terms covered by Section 304-B of the IPC. It may not be out of place to mention that this provision was inserted by Act 43 of 1986 with effect from 19.11.1986. This was followed by insertion of Section 113-B in the Indian Evidence Act, by Act 43 of 1986, with effect from 1.5.1986. Section 113-B of the Indian Evidence Act reads as follows:

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> "**113-B. Presumption as to dowry death.**- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.
>
> Explanation.- For the purpose of this section, "dowry death", shall have the same meaning as in section 304-B of the Indian Penal Code (45 of 1860)."

It is manifest on a plain reading of Section-113-B of the Indian Evidence Act that once an offence under section 304-B is proved, a rebuttable presumption attaches to the guilt of the accused. In other words, once the offence under

section 304-B of the IPC is proved, the onus by automatic operation of law shifts to the accused to disprove that he has not committed the offence, the wife had not died on account of the atrocities attributable to the appellants and not for demands of dowry. As stated hereinabove the onus to rebut allegation not been discharged. The evidence of D.W.1 has been discarded. We are, therefore, left with no option but to convict the appellants under section 304-B read with section 34, as well as section 201 of the IPC.

14. This takes us on to the question of sentence. Learned counsel for the appellants has submitted that in view of the conversion of conviction from section 302 to 304-B of the IPC, there is no need to award the maximum punishment to the appellants under section 304-B of the IPC. She has submitted that the appellants attempted to set up the defence of natural death. It is another matter that their evidence has, on close scrutiny, been rejected by this Court. Section 304-B of the IPC, inter alia, provides that, in case of a dowry death, the accused persons shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life. In the facts and

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circumstances of this case, in our view, the interest of justice would be served if the sentence is reduced to eight years rigorous imprisonment.

15. In the result, the appeal is substantially dismissed. The appellants are convicted under section 304-B, read with section 34 as well as section 201 of the IPC. They shall suffer rigorous imprisonment for a period of eight years. The sentence awarded by the learned trial court in terms of section 201 of the IPC is maintained. Both the sentences shall, however, run concurrently.

16. The High Court Legal Services Committee, Patna, shall pay a sum of Rs.2,000/- (rupees two thousand) to Mrs. Rina Sinha, learned counsel, who has assisted us as Amicus Curiae.

17. Let a copy of this judgment be handed over to Mrs. Rina Sinha, Advocate.

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(Sudhir Kumar Katiar, J.)

(Syed Md. Mahfooz Alam, J.)

Patna High Court, Patna
Dated the 23rd day of July, 2008.
S.K.Pathak/ (N.A.F.R.)